NO. 19093

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ADAI LESER and CZALI LESER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the Southern District of California, Central Division

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APPELLANT'S CLOSING BRIEF

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I

REPLACEMENT OF A JUROR

The crutch on which the government rests its first point as to the replacement of a juror after he had become incapacitated and after the jury had deliberated several hours without the consent of the defendants, or either of them, and outside of their presence, does not exist and is not available in the federal courts.

The government leans, for its crutch, on California state practice, which is solely statutory, and contends that there was a waiver by counsel and a stipulation by counsel and therefore the replacement of juror Swan by alternate juror Cholcher, who should have been discharged when the jury retired, was perfectly all right, and it relies on California state cases.

But California's state cases are purely statutory and exist only by reason of California's statutes authorizing such a replacement. Prior to 1933 the substitution had to be before final submission of the case to the jury. Penal Code of California Section 1089 was amended in that year to permit an alternate to come in after the final submission of the case to the jury. This unusual procedure had the unfortunate consequence of adding a juror who did not have the benefit of prior deliberations.

See:

24 Cal. Law. Rev. 735

People v. Love, 21 Cal.App.2d 628

People v. Lanigan, 22 Cal.2d 577

Even in California procedure, and since the prosecution relies on possible waiver, we may take an example from the waiver of trial by jury entirely

under Article 1, Section 7 of the California Constitution. If counsel alone expresses a waiver, even though in the presence of the defendant and presumably with his implied consent, it is ineffective.

People v. Garcia, 98 Cal.App. 702, 277 P. 747

People v. Spinato, 100 Cal.App. 600, 280 P. 691

People v. Pechar, 130 Cal.App.2d 616, 279 P.2d 570

People v. Banjamin, 140 Cal.App.2d 703, 295 P.2d 477

People v. Barnum, 147 Cal.App.2d 803, 808, 305 P.2d 986

People v. Walker, 170 Cal.App.2d 159, 165, 338 P.2d 536

Even though the defendant gestures a consent by a movement of his head downward in a nodding motion, this would not be sufficient.

People v. Pechar, 130 Cal.App.2d 619

In *People v. Holmes* (1960), 54 Cal.2d 442, 353 P. 2d 583, the case was called for trial and the Public Defender advised the court that a jury was waived. The court said "All right, take the waiver". The prosecutor then asked the defendant if he knew he had

a right to a jury trial on the charges. The defendant answered "Yes" and his counsel said "I join in the waiver". The Supreme Court held there was no waiver because the defendant had failed to use express words to that effect. (55 Cal.2d 443)

Even under California practice, if after all alternate jurors have been made regular jurors, or if there is no alternate juror a juror becomes sick or otherwise unable to perform his duties and has been discharged by the court as provided, the jury shall be discharged and a new jury then and afterwards impanelled and the cause may again be tried.

Penal Code of California, Section 1123

The defendant may, of course, avoid this result by consenting personally to a continuation of the trial before a jury of less than twelve.

People v. Patterson, 169 Cal.App.2d 179, 187, 337 P.2d 163

People v. Ragsdale, 177 Cal.App.2d 676, 678

But none of these things occurred in the instant case. The measure of power is that adopted by the rules and approved by the Supreme Court. The argument by the government must be addressed to the rule-making powers of the Supreme Court and to the Congress of the United States, which must pass on those rules

after they are submitted. They cannot be altered by court decision, which is judicial legislation.

It is respectfully submitted, therefore, that it was highly prejudicial for the court to have removed a juror without defendants' knowledge or consent. It also seems strange and interesting that throughout the trial the court was very meticulous in getting the defendants' consents to matters from time to time except this one, when it substituted the juror without the knowledge or consent of the defendants and, in fact, during their entire absence from the courtroom.

The California cases cited by the government on page 34, of course, are those cases which proceeded according to California statutes, which we have discussed. As a matter of fact, all three of the cases were cases in which present counsel was the attorney for the appellants in the state cases.

Patton v. United States does not help the government, as in that case there was a consent of the waiver to try the case by less than twelve jurors by the defendants. It is respectfully submitted that the authority of the attorney does not extend to this fundamental procedure even under California law or under California procedure, which is constitutional

and statutory in that case.

In respect to the issue of prejudice, a denial of a fundamental constitutional right is not cured by showing of prejudice or a lack of prejudice. Prejudice is presumed when a constitutional right is denied.

Hamilton v. Alabama, 368 US 52, 7 L.ed.2d 114

White v. Maryland, 373 US 59, 10 L.ed.2d 193

II

DOUBLE JEOPARDY

Defendants were placed in double jeopardy as the result of the discharge of the juror. What we have said in reference to Point I, therefore, applies to the second point of the argument in respect to removing one juror. We submit that double jeopardy took place when one of the jurors was removed after deliberation without the knowledge and personal consent of the defendants. Another jury continued to carry on and bring in a purported verdict in the case.

We submit, therefore, that the defendants have been once in jeopardy.

People v. Young, 100 Cal. 18

III

UNLAWFUL COMMUNICATION WITH THE JURY

What we have said heretofore about the substitution of the juror shows that there must have been communications outside of the presence of the defendants and their counsel, causing the substitution in the absence of the defendants and therefore, in effect, denying them fully that public trial guaranteed by the Sixth Amendment to the Constitution of the United States and Rule 43, Federal Rules of Criminal Procedure.

There was no waiver by the defendants and this was not an irregularity of the type that Rule 52(a), Federal Rules of Criminal Procedure, was designed to exclude.

IV

THE TRIAL JUDGE WAS GUILTY OF PREJUDICIAL MISCONDUCT

The trial judge was guilty of prejudicial misconduct by his participation and control of the trial. We have set forth in our opening brief some of the many instances in which the trial judge actively participated in the conduct of the trial.

We think that the rule is well stated that the

trial judge must not so conduct himself that he becomes an advocate or that the jury views that he is taking one side against the other. When he does either of those two things, he ceases to be a judge and assumes the role of the prosecutor and thus aligns his position and his weight against the defendant. Government counsel is already in a weighty position by the mere fact that he is representing the government. The additional weight of a judge thrown in makes it impossible for a defendant to receive that fair trial which due process of law under the Fifth Amendment guarantees to every defendant.

A fair reading of the record in this case will show that the jury could not help but be impressed by the weight the trial judge was giving to the prosecution's case. We will not delineate it any further.

In *Bollenbach v. United States*, 326 US 607, 90 L.ed. 350, it is stated:

> "'The influence of the trial judge on the jury is necessarily and properly of great weight,' *Starr v. United States*, 153 US 614, 626, 38 L.ed. 841, 845, 14 S.Ct. 919, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the

> judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge."

It is stated in *Quercia v. United States*, 289 US 466, 77 L.ed. 1321:

> "The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling'. This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one-sided".

It is for this Court to determine, upon examination of the entire record, whether the defendants were deprived of fair trial by the activity of the judge and his leaning toward the government in the case.

V

THE INDICTMENT IS INSUFFICIENT TO CHARGE AN OFFENSE AGAINST THE LAWS OF THE UNITED STATES.

We have set forth in our opening brief the rules set out by the Supreme Court of the United States in *Russell v. United States*, 369 US 749, 769, 771. We think that where the offense is based upon mail fraud the means of the fraud, to-wit: the letters in furtherance of that scheme, must be set forth in charging the use of the mails to see that, in fact, an offense has been committed by the use of the mails and to protect the defendants against double jeopardy. This the government failed to do in respect to the letters heretofore referred to in the various counts.

VI

THE TRIAL COURT ERRED IN THE ADMISSION AND EXCLUSION OF EVIDENCE.

It was error to deny the defendants the right to read, on cross-examination, the letters and telegrams set forth in the indictment since the basis of the charge was the letters and telegrams. This was the gravamen of the charges. Denial of this right was a denial of cross-examination.

The court improperly excluded the reading in open court of various letters and exhibits which was an explanation of the gravamen of the charge and erred in limiting, in effect, the cross-examination of the charges.

Herd v. United States, 255 F. 829

Lindsay v. United States, 133 F.2d 368

It is a fundamental right of the defendant in all criminal prosecutions to not only be confronted by the witnesses and documents that are allegedly against him, but to have them presented in explanation of his case. He has the right to have all of those matters fully presented to the jury.

Maddox v. United States, 156 US 237

Robertson v. Baldwin, 165 US 275

Kirby v. United States, 174 US 47

Dowdell v. United States, 221 US 325

Salinger v. United States, 272 US 542, 548

Furthermore, it is a fundamental rule that when a part of a transaction is presented by the government, or one side, that the defendant has a full right to present the rest of it in explanation of it and to have the whole transaction viewed in its entirety. Since the letters and telegrams were a part of the transaction, it was error to exclude them.

California's Code of Civil Procedure, Section 1854, gives that specific right by statute:

> "When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood, may also be given in evidence."

See:

Ashley v. Rivera, 220 Cal. 75, 29 P.2d 199

Hatfield v. Levy Bros., 18 Cal.2d 798, 812, 117 P.2d 841

Hawkinson v. Oesdean, 61 Cal.App.2d 712, 719, 143 P.2d 967

Risdon v. Yates, 145 Cal. 210, 213

Clark v. Clark, 133 Cal. 667, 671

Leboire v. Royce, 100 Cal.App.2d 610

In *People v. Whitehead,* 113 Cal.App.2d 43, 243 P.2d 17, the court held that it was error to exclude

on cross-examination the full details and conversation where only acts and movements were brought out on direct examination. By examining the witnesses as it did, the court held that the prosecution opened the door to the cross-examiner to bring out all the facts.

We submit that the letters and telegrams were an essential part of the case and their exclusion constituted reversible error.

In *Bass v. United States,* 20 App. D.C. 232, it was held error to refuse to permit the defendant to read letters to the jury.

Devising a scheme is not the offense. The offense denounces the use of the post office establishment in execution of the scheme.

Sandals v. United States, 213 F. 569

It is the use of the mails after having formed an intention to defraud other persons.

Charles v. United States, 313 F. 707

It is essential that a distinction be made between use of the mails in pursuance of a scheme to defraud and the mere production of a fraudulent result through the use of the mails.

United States v. Bachman, 246 F. 1009

The gist of the offense is the abuse of the mails

and the corpus delicti is the mailing of the letters in execution of the unlawful scheme.

United States v. Jones, 10 F. 469

O'Hara v. United States, 129 F. 551

Brady v. United States, 24 F.2d 397, cert. den. 278 US 603; see also 24 F.2d 399, 405

Hence it was the right of the defendant to have the letter produced and to cross-examine regarding the use of the letter and the time it was mailed and its relationship to the alleged scheme to defraud, if any.

VII

THE COURT ERRED IN GIVING THE INSTRUCTION ON AGENCY

The Contractors' Consulting Service was organized independently and the evidence shows that it was an independent organization, whose officers were in Pasadena. The officers of the CCS were a Mr. Locke, a Mr. Burkett, and a Mr. Friedlander, who made the alleged representations in the absence of the defendants. It appears that they claimed to be licensed real estate brokers and were not, and they were ordered to cease and desist in their operations.

However, whether they were acting independently or were acting as agents of the appellants was a matter for the jury to determine from all of the evidence and it was error for the court to give the instructions which it did and which, in effect, invaded the province of the jury. It was of no purpose to tell the jurors that they should not pay attention to the judge's holding since the jury weighs every little thing that the judge says as though it was the gospel and holy writ.

Bollenbach v. United States, 326 US 612

We have covered all points fully in our opening brief and they require no further argument, except the following:

XI

USE OF EVIDENCE SECURED BY A NEW YORK GRAND JURY

We respectfully submit that the matter of using evidence obtained in New York by a New York grand jury in furtherance of the prosecution in Los Angeles was a violation of Rule 6(e), Federal Rules of Criminal Procedure, and a violation of defendants' constitutional rights. The Brooklyn grand jury obtained its evidence not for the purpose of presenting that

evidence in a Los Angeles courtroom and the use of this evidence was highly prejudicial and highly improper. The defendants' rights were violated by the seizure of these books and records for this purpose and it was an unlawful search and seizure in violation of the Fourth Amendment to the Constitution of the United States.

We have fully set out in our opening brief the errors in the court's instructions to the jury which were misleading and an over-simplification of the jury's duties.

XIII

THE HOLDING OF THE TRIAL DURING A RELIGIOUS HOLIDAY

It is respectfully submitted that when the case was first called for trial, it was represented to Judge Yankwich that the trial would last between 7 and 10 days. Instead, it lasted several months. There was no contemplation at that time that the trial would extend into the holiday period. When it did, the court should have, in deference to the defendants' rights, continued the matter for the one day involved.

APPELLEE'S STATEMENT OF THE FACTS

We have answered all of the points in the reply brief of appellee except the statement of the facts. This statement is incomplete. We have dealt with the legal arguments which we thought are sufficient to require reversal without encumbering the Court with a further statement of the facts. However, there should be an amplification and correction of many of the statements made by the appellee.

The record will show that the appellants sought to place before the jury that they were in the business of supplying money for mortgages and that they had placed many hundreds of thousands of dollars worth of mortgages for loans. There was a letter from Dr. Barr that appellants had secured a loan of $15,200,000 from the Teamsters Union headed by Hoffa. Further, that they had placed them with banks, foundations, FHA and VA loans, apartment house, tract, shopping center and commercial buildings. The court excluded all of this evidence. Further, the appellants made an offer of proof as to the letter from Dr. Barr, which would establish these facts, which offer of proof was denied and rejected.

There was error also in the statement that the appellants had no connections with Hoffa when they

sought to show that they did have connections with people whom they, the appellants, employed: Attorney Lamar Caudle, formerly with the United States government, Phil Weiss, Max Block and others who had carried proposed loans to Hoffa for the appellants. All this evidence was excluded. The court did not allow defendants to produce loans which they had completed, to show their entire operation. The court held that this had nothing to do with the case.

The government alleged that the defendants were engaged in a fraudulent scheme or operation, but never let the defendants produce evidence that, in fact, they placed large and small loans and had commitments from banks directly to them to show that they were engaged in legitimate business. The only evidence admitted related to loans which were unsatisfactory and which were involved in this case, such as had not been carried out.

The court also rejected and refused to allow testimony that the Continental Capital Corporation had other loans from various other people not in any way connected with defendants and that they took money for services in connection with other loans and therefore they were acting as mortgage brokers by themselves and for themselves and were an independent

outfit and were not the agents of the appellants. The appellants sought to prove that they submitted loans to Empire Savings & Loan, a mortgage broker in New York, and they took money from other outfits which the defendants did not in any way handle, thus showing they were not an agent of the defendants but were an independent firm of mortgage brokers. Further, the court rejected proof that the State of California ordered them to cease and desist as they had no right to act as real estate brokers.

Furthermore, the prosecution did not call Friedlander (vice-president of Continental Capital Corporation). He was the one who allegedly made all of the untrue statements about Hoffa for which the appellants were being held and charged. The prosecutor's statements to the court and jury were about this. The defendants did not meet the applicants who made their applications to the company.

ERRORS IN THE APPENDIX TO APPELLEE'S BRIEF

The appendix of purported moneys received falsely sets forth matters that are untrue or incorrect as far as the appellants are concerned.

The appellants received nothing and had no deals

with Aina Alii or Queen Development.

From Joseph P. Cogan they received a site inspection fee of $3,000; from Equity Enterprises, $3,000; from Ferman Builders, $3,000; from Hi Valley, $3,000.

The money was returned to Lucot and to Pantry Markets.

They received $3,000 for site inspection from Rancho Presidio.

They returned the money to Sindell.

They received $3,000 from Stockman for site inspection; $3,000 from Tanque Verde; $3,000 from Tri Valley.

They received nothing from Judge Walters.

The check received from Gardner was not good.

The money received from Seaside Towers was returned.

As to Nat Winkelman, they never met him.

As to the Continental Hotel, there was a site inspection fee paid for another broker.

They returned the fee to Hertweck.

They never received any money from Hon Kau Lee.

They received $3,000 for site inspection from Tahoe Surf.

This was an entirely different story than apparently the brief represents. The sum of $3,000

has been regarded as a reasonable fee for site inspections regarding loans.

The story is not told here as to the loans that these defendants actually effected. They were not permitted to show the loans that they legitimately arranged.

CONCLUSION

WHEREFORE, appellants pray that this Honorable Court reverse the judgments below, and each of them.

Respectfully submitted,

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